RECORD AND BRIEFS

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No. 15-118

In the Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL., PETITIONERS

v.

JESUS MESA, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners have brought a civil action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), seeking damages from a U.S. Border Patrol agent who, while standing in the United States, fatally shot a Mexican citizen who was in Mexico. The questions presented are as follows:

1. Whether the court of appeals erred in holding that the Mexican citizen lacked Fourth Amendment protections.

2. Whether the court of appeals erred in concluding that any substantive-due-process right under the Fifth Amendment was not clearly established.

PARTIES TO THE PROCEEDING

Petitioners were the plaintiffs-appellants in the court of appeals.

Only one respondent, Jesus Mesa, Jr., is identified in the caption of the petition for a writ of certiorari and on the Court's docket. But, as noted in the letter the government filed when waiving its response to the petition, several other entities and individuals represented by the Department of Justice—specifically, the United States, the U.S. Department of Homeland Security, U.S. Customs and Border Protection, the U.S. Border Patrol, the U.S. Immigration and Customs Enforcement, the U.S. Department of Justice, Ramiro Cordero, and Victor M. Manjarrez, Jr.—were also parties to the proceeding in the court of appeals. They were the defendants-appellants in the two other appeals brought by petitioners that were consolidated with petitioners' appeal against respondent Mesa. See Pet. App. 1-2 (caption identifying parties in the court of appeals). Although petitioners have not challenged the aspects of the court of appeals' decision affirming the dismissal of all claims against those entities and individuals, see Pet. ii; Pet. App. 3-4, 60-61, 104-105, they were nevertheless "parties to the proceeding in the court whose judgment is sought to be reviewed" and are therefore "deemed parties entitled to file documents in this Court," Sup. Ct. R. 12.6. Petitioners have acknowledged that those entities and individuals should be treated as respondents in this Court. See Cert. Reply Br. 1 n.1.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

On August 26, 2015, the government waived its right to file a response to the petition for a writ of certiorari on behalf of the United States, other federal entities, and two individuals represented by the Department of Justice in the district court and court of appeals. See p. II, *supra* (identifying those parties); Sup. Ct. R. 12.6. On November 30, 2015, the Court invited the Solicitor General to express the views of the United States. In the view of the United States, the petition should be denied.

STATEMENT

1. According to the allegations in petitioners' complaint, on June 7, 2010, petitioners' son, Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, was playing with his friends in the cement culvert that separates the United States from Mexico near an international port-of-entry linking El Paso, Texas, with Ciudad Juárez, Mexico. Pet. App. 144-146. Their

alleged game involved touching the barbed-wire fence on the U.S. side of the culvert and running back into Mexico. *Ibid.*

The complaint alleges that respondent Jesus Mesa, Jr., a U.S. Border Patrol agent, arrived on the scene, detained one of Hernández's friends on the U.S. side of the border, and then, while standing in U.S. territory, fatally shot Hernández, who was in Mexico and "had no interest in entering the United States." Pet. App. 146. The FBI released a statement explaining that Agent Mesa had used force because Hernández and others had refused commands to stop throwing rocks at Mesa. *Id.* at 147.

After an investigation, the Department of Justice declined to bring any criminal charges but reiterated its regret about the loss of life and its continuing commitment to working with the Mexican government to prevent future incidents and to investigating other allegations of excessive force by law-enforcement officers. See U.S. Dep't of Justice, *Federal Officials Close Investigation into the Death of Sergio Hernandez Guereca* (Apr. 27, 2012), www.justice.gov/opa/pr/2012/April/12-crt-553.html.

2. Petitioners initially brought suit against the United States, unknown agents of the U.S. Border Patrol, and several federal agencies, alleging that the shooting of their son had violated the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680; the Alien Tort Statute (ATS), 28 U.S.C. 1350; and the U.S. Constitution. Pet. App. 122. Petitioners later named Agent Mesa as one of the agents. *Ibid.*

Pursuant to the Westfall Act, 28 U.S.C. 2679, the district court accepted the certification of the Attorney General to substitute the United States as the only

defendant for all of petitioners' FTCA and ATS claims. Pet. App. 125-126. The court subsequently dismissed those statutory claims, concluding that Congress had not waived federal sovereign immunity with respect to them. *Id.* at 127-137.

The district court, however, granted petitioners' request to amend their complaint to "refashion" their constitutional claims into "claims against unknown federal agents" under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Pet. App. 137-138. The court severed the individual-capacity claims from the ones against the United States and entered final judgment in favor of the United States. *Id.* at 138-139. Petitioners appealed that judgment. *Id.* at 58, 60.

In the new, severed suit, petitioners' Third Amended Complaint asserted *Bivens* claims under the Fourth and Fifth Amendments against Agent Mesa and those who allegedly supervised him. Pet. App. 141-142. The district court dismissed the *Bivens* claims against Mesa, holding that Mesa is entitled to qualified immunity because the Fourth and Fifth Amendments do not apply to Mexican nationals in Mexico. *Id.* at 109-119. Petitioners appealed that order without asking the district court to certify it as a final judgment. 11-331 D. Ct. Doc. 49. In a later order, the court dismissed the claims against the supervisors, because petitioners had failed to raise a genuine issue of material fact that there was any causal link between the shooting and their supervision of Mesa months or years earlier. Pet. App. 59-60. The court entered final judgment with respect to the claims against Mesa and the supervisors, and petitioners filed a third notice of appeal. 11-331 D. Ct. Docs. 51, 53.

3. The court of appeals consolidated all three appeals. Pet. App. 60. Initially, a three-judge panel affirmed in part, reversed in part, and remanded. *Id.* at 54-108.

a. As relevant here, the panel concluded unanimously (albeit on the basis of different rationales) that Agent Mesa had not violated the Fourth Amendment. Pet. App. 71-80 (Prado, J.); *id.* at 105-106 (Dennis, J., concurring in part and concurring in the judgment); *id.* at 107 (DeMoss, J., concurring in the result in this regard).

b. The panel majority nevertheless found that Agent Mesa had engaged in conscience-shocking conduct in violation of the Fifth Amendment. Pet. App. 102. The majority concluded that the Fifth Amendment was applicable in this extraterritorial context. The majority observed that this Court in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), had held the Suspension Clause applicable to aliens held at the Guantanamo Bay Naval Station. As the majority saw it, a similar result should be reached here, because Hernández was "a civilian killed outside an occupied zone or theater of war," *id.* at 82-83, and the shooting occurred in a place near the international border where the majority believed the U.S. Border Patrol exercises a degree of control sufficiently comparable to that which the United States exercised in Guantanamo Bay. Pet. App. 84-86.

The panel majority further concluded that no special factors warrant hesitation before extending a *Bivens* remedy to this new context. Pet. App. 89-99. And it held that Agent Mesa is not entitled to qualified immunity because it found that the unconstitutionality

of his conduct was clearly established at the time of the shooting. *Id.* at 102-104.[1]

c. Judge DeMoss dissented from the finding of a Fifth Amendment violation, concluding that "the Fifth Amendment does not protect a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." Pet. App. 108.

4. The court of appeals granted rehearing petitions filed by the United States and Agent Mesa. Pet. App. 51-53. The 15-member en banc court affirmed the district court's judgments dismissing all of petitioner's claims. *Id.* at 7. After reinstating the portions of the original panel opinion affirming the dismissal of the claims against the United States and against the supervisory defendants, the court of appeals focused on the constitutional claims against Mesa. *Id.* at 4.

a. With respect to the Fourth Amendment, the court of appeals held that petitioners had failed to allege a violation, because Hernández was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." Pet. App. 4 (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). Only two members of the court declined to join that reasoning. As at the panel stage, Judge Dennis concurred in that result. *Id.* at 31-32. He believed that *Boume-*

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[1] The panel unanimously affirmed the dismissal of the statutory claims against the United States on sovereign-immunity grounds (Pet. App. 60-65) and the dismissal of the *Bivens* claims against the supervisory defendants (*id.* at 104). It did not address the alternative argument, pressed on behalf of the supervisory *Bivens* defendants, that the FTCA's judgment bar precludes petitioners' *Bivens* claims. See pp. 21-22, *infra*.

diene requires a more pragmatic test than was applied in *Verdugo-Urquidez*, but that the Fourth Amendment is still inapplicable because "judicial entanglement with extraterritorial Fourth Amendment excessive-force claims" would likely be "impracticable and anomalous." *Id.* at 32. Judge Graves did not dissent from the Fourth Amendment holding, but his partial concurrence stated that the court "should carefully adjudicate" that claim. *Id.* at 50.

b. The en banc court was "somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment," but it was "unanimous in concluding that any properly asserted right was not clearly established to the extent the law requires." Pet. App. 5. It observed that "[r]easonable minds can differ on whether *Boumediene* may someday be explicitly extended as [petitioners] urge," but that "nothing in [*Boumediene*] presages, with the directness that the 'clearly established' standard requires, whether the Court would extend the territorial reach of a different constitutional provision—the Fifth Amendment [rather than the Suspension Clause]—and would do so where the injury occurs not on land controlled by the United States, but on soil that is indisputably foreign and beyond the United States' territorial sovereignty." *Id.* at 6.

c. Several members of the court of appeals filed concurring opinions. Judge Jones, joined by three colleagues, explained that petitioners' excessive-force claim would arise, if at all, only under the Fourth Amendment, and not under the Fifth Amendment. Pet. App. 10-11 (discussing, *inter alia*, *Graham* v. *Connor*, 490 U.S. 386, 394 (1989)). In any event, she would have further held that the Fifth Amendment

does not apply to aliens outside the sovereign territory of the United States. *Id.* at 16-20.

As noted above, Judge Dennis would have relied on *Boumediene*, rather than *Verdugo-Urquidez*, to conclude that petitioners have no valid Fourth Amendment claim. Pet. App. 31-32.

Judge Prado disagreed with Judge Jones's analysis of the merits of petitioners' Fifth Amendment claim. He concluded that *Graham* does not preclude reliance on substantive due process when the Fourth Amendment is (as here) found to be inapplicable, Pet. App. 33-36, and that "a noncitizen situated immediately beyond our nation's borders may invoke the protection of the Fifth Amendment against the arbitrary use of lethal small-arms fire by a U.S. government official standing on U.S. soil," *id.* at 41-42. But he recognized that Agent Mesa is entitled to qualified immunity because the Fifth Amendment's applicability to such circumstances is not yet clear. *Id.* at 42-43.

Judge Graves's concurring opinion agreed with the unanimous conclusion that any Fifth Amendment violation was not clearly established, but he would have given more consideration to petitioners' ATS and Fourth Amendment claims. Pet. App. 50.[2]

ARGUMENT

Petitioners first contend (Pet. 13-23) that the court of appeals erred by analyzing their Fourth Amendment claim under *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), rather than under *Boumediene* v. *Bush*, 553 U.S. 723 (2008). That contention lacks mer-

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[2] Judge Haynes, joined by two colleagues, wrote separately to address petitioners' ATS claim, Pet. App. 43-49, which is not at issue in this Court.

it, but, as the opinions below indicate, petitioners' claim would fail under either approach, and there is no disagreement in the courts of appeals that suggests otherwise. Petitioners also contend (Pet. 23-31) that the court of appeals erred in unanimously concluding that Agent Mesa is entitled to qualified immunity on their substantive-due-process claim, because its analysis relied on Hernández's status as a non-U.S. citizen, which was a fact that Mesa did not actually know at the time of the shooting. That contention—which was passed upon, at most, only implicitly—is also meritless. Any Fifth Amendment violation was not clearly established, and there is no conflict between the decision below and that of any other court of appeals. In any event, the judgment against petitioners is also supported by two alternative grounds that the government advanced below and that would obviate any need to decide either of the questions presented.

Hernández's death was tragic. This case, however, is not about the legal standard governing the justifiable application of force, but whether petitioners have alleged that Agent Mesa's actions were clearly established constitutional violations for which the Court should infer a damages remedy. Nor does the court of appeals' decision permit agents to "shoot with impunity" (Pet. 23) into Mexico. The United States has instituted criminal proceedings for another cross-border shooting and, although the government declined to extradite Mesa in this particular case, the Mexican courts have jurisdiction over any tort or crime arising from a fatal injury in Mexico. The Court should deny certiorari.

A. The Court Of Appeals Correctly Concluded That The Fourth Amendment Did Not Apply To Hernández

1. Petitioners contend (Pet. 21-23) that the court of appeals erred in holding the Fourth Amendment inapplicable to this cross-border shooting incident. As 13 members of the en banc court recognized (Pet. App. 4), that argument is foreclosed by this Court's decision in *Verdugo-Urquidez*, which involved a defendant who was taken into custody in the United States before his property in Mexico was searched. 494 U.S. at 263-264. Finding that the defendant lacked any "previous significant voluntary connection with the United States," the Court held that he had no Fourth Amendment right to assert. *Id.* at 271. In this case, petitioners' complaint acknowledges that, at the time of his shooting, Hernández was "safely and legally on his native soil of Mexico" and "had no interest in entering the United States." Pet. App. 146-147. His only alleged connection with the United States—playing a game that involved touching the border fence and running away, *id.* at 146—was not sufficient to vest in him a Fourth Amendment right to be free from unreasonable searches and seizures.

2. Petitioners do not dispute that Hernández lacked Fourth Amendment rights under *Verdugo-Urquidez*. They instead contend (Pet. 13-18) that *Verdugo-Urquidez* was implicitly overruled or modified by *Boumediene*'s more functional approach. That contention lacks merit.

Boumediene held that the Suspension Clause applied to aliens detained by the United States at the Guantanamo Bay Naval Station, in light of the "complete jurisdiction and control"—equivalent to "*de facto* sovereignty"—that the United States exercised there.

553 U.S. at 755, 763. In doing so, the Court rejected the government's argument that the United States' lack of *de jure* sovereignty over Guantanamo Bay sufficed to demonstrate that the Suspension Clause had no application there; invoking prior cases, the Court observed that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. In making that statement, however, the Court did not mention, let alone overrule or modify, its prior decision in *Verdugo-Urquidez*, which concerned a different constitutional provision and different circumstances. And the Court did not, as petitioners infer (Pet. 17), adopt an *ad hoc* balancing test involving an unspecified array of "pragmatic and context-specific" factors, under which the Fourth Amendment's applicability would vary from case to case.

Petitioners suggest otherwise, arguing (Pet. 15-16) that *Boumediene*'s consideration of "objective factors and practical concerns" is inconsistent with the opinion for the Court in *Verdugo-Urquidez*, and draws instead from Justice Kennedy's concurring opinion, which considered whether application of the Fourth Amendment would be "impracticable and anomalous." 494 U.S. at 278. But Justice Kennedy also joined the Court's opinion in *Verdugo-Urquidez* and recognized that his discussion did not "depart in fundamental respects" from the Court's "persuasive justifications" for finding the Fourth Amendment inapplicable. *Id.* at 275, 278. And the Court's own reasons included practical considerations, such as the "significant and deleterious consequences" that extraterritorial application of the Fourth Amendment would have for "the United States in conducting activities beyond its boundaries."

Id. at 273; see *id.* at 273-274 ("Application of the Fourth Amendment to" U.S. military forces abroad "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."). *Boumediene*, in short, left undisturbed *Verdugo-Urquidez*'s conclusion about the Fourth Amendment's inapplicability.

3. In any event, as the opinions below indicate, petitioners' Fourth Amendment claim would not succeed even under petitioners' preferred functionalist approach. The panel majority took account of the functional factors considered in *Boumediene*, Pet. App. 77, and it found that "a number of practical considerations" supported its "reluctance to extend the Fourth Amendment on these facts," *id.* at 78-80. Similarly, Judge Dennis, who was "inclined to agree" that *Boumediene* had displaced *Verdugo-Urquidez*, still concluded that "judicial entanglement with extraterritorial Fourth Amendment excessive-force claims would be likely to involve impracticable and anomalous factors." *Id.* at 31-32 (concurring in part and concurring in the judgment of the en banc court).

There is no basis for petitioners' contention (Pet. 1) that Hernández was in an area of Mexico that was under "exclusive U.S. control." The complaint includes no such allegations, Pet. App. 146-147, and the extra-record evidence cited in the original panel opinion shows at most that federal agents can, and "occasionally" do, operate in the border zone, *id.* at 84. But the same was true for the Mexican cities in which federal agents executed the searches in *Verdugo-Urquidez*. And the border area in no way resembles the "*de facto* sovereignty" at Guantanamo Bay. *Boumediene*, 553 U.S. at 755; see *id.* at 747, 753, 754, 764, 765, 769, 771

(describing the United States' authority at Guantanamo Bay as "total military and civilian control," "complete jurisdiction and control," "plenary control," "practical sovereignty," "complete and uninterrupted control * * * for over 100 years," and "complete and total control"). Indeed, it does not even approach the control the United States had inside Landsberg Prison in occupied Germany, which was itself found to be "critical[ly] differen[t]" from Guantanamo Bay. *Id.* at 768.

Petitioners declare (Pet. 23) that, unless the Fourth Amendment applies here, border patrol agents will be able to "shoot with impunity" into Mexico. But that is hyperbole. The Executive Branch's decision not to extradite an individual in this particular case (see Pet. 7) does not alter the Mexican courts' jurisdiction over any tort or crime that occurred when someone *in Mexico* was struck by a bullet. Petitioners also err in dismissing (Pet. 6-7) the possibility of a criminal prosecution for the kind of misconduct alleged here. After an investigation by the Department of Justice, no such prosecution was brought against Mesa. See p. 2, *supra*. But the United States has brought a federal murder charge against another border patrol agent who was in the United States when he shot and killed a Mexican citizen in Mexico. See *United States* v. *Swartz*, No. 15-CR-1723 (D. Ariz.); see Pet. 25-26 (describing district court decision in *Bivens* action arising from that shooting).[3]

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[3] A murder conviction could require restitution to the victim's family including lost future wages. See 18 U.S.C. 3663A(a)(1)(A) and (b)(2)(C); *United States* v. *Serawop*, 505 F.3d 1112, 1125-1128 (10th Cir. 2007) (affirming restitution to estate of three-month-old manslaughter victim including $325,751 in lost future wages).

Functional considerations thus support the conclusion that the Fourth Amendment does not apply in the circumstances here. "If there are to be restrictions on searches and seizures which occur incident to * * * American action [abroad], they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Verdugo-Urquidez*, 494 U.S. at 275.

4. There is no disagreement in the courts of appeals about the correct answer to the Fourth Amendment question here. Since *Boumediene*, other courts of appeals have recognized that *Verdugo-Urquidez* continues to govern the extraterritorial application of the Fourth Amendment. See *United States* v. *Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015) (Wood, J.) ("At a minimum, *Verdugo-Urquidez* governs the applicability of the Fourth Amendment to noncitizens."), petition for cert. pending, No. 15-7017 (filed Nov. 16, 2015); *United States* v. *Emmanuel*, 565 F.3d 1324, 1331-1332 (11th Cir.), cert. denied, 558 U.S. 1099 (2009); see also *United States* v. *Stokes*, 726 F.3d 880, 892 (7th Cir.), cert. denied, 134 S. Ct. 713 (2013) (relying on *Verdugo-Urquidez* in holding that the Fourth Amendment's warrant requirement does not apply to searches of U.S. citizens' property abroad); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 168-169 (2d Cir. 2008) (same), cert. denied, 558 U.S. 1137 (2010).

Petitioners contend (Pet. 1-2, 13, 18-20; Cert. Reply Br. 2) that the Ninth Circuit disagreed with that consensus in *Ibrahim* v. *Department of Homeland Security*, 669 F.3d 983 (2012). But *Ibrahim* was not a Fourth Amendment case at all; instead, it addressed claims under the First and Fifth Amendments. Moreover,

unlike petitioners, the Ninth Circuit in *Ibrahim* saw no irreconcilable conflict between *Boumediene* and *Verdugo-Urquidez*. It felt "bound to follow" both "the 'functional approach' of *Boumediene* and the 'significant voluntary connection test' of *Verdugo-Urquidez*." *Id.* at 997. The majority held that a Malaysian citizen could assert her constitutional claims arising from her alleged placement on terrorist watchlists. *Ibid.* Although the plaintiff was located outside the United States at the time of her suit, she had established a "'significant voluntary connection' with the United States" because she had been a graduate student at Stanford University for several years, had allegedly been unconstitutionally placed on a No Fly List while she was still in the United States, and the purpose of her "brief" trip abroad was to present her research at a Stanford-sponsored conference, which the court saw as "further[ing]" her connection with the United States. *Id.* at 987, 997.

Petitioners do not suggest that Hernández had sufficient connections to satisfy *Ibrahim*. Instead, they assert (Pet. 19) that the Ninth Circuit may not really believe that connections to the United States are "a *prerequisite* to extraterritoriality." To that end, they invoke (Pet. 19-20) a single district court decision, which would be insufficient to establish a conflict warranting this Court's review. Sup. Ct. R. 10. That decision still required a "substantial voluntary connection," and the district court believed it had found one based on allegations about a Mexican teenager's "strong familial connections to the United States" and residence within four blocks of the border. *Rodriguez* v. *Swartz*, 111 F. Supp. 3d 1025, 1035-1036 (D. Ariz. 2015), appeal pending, No. 15-16410 (9th Cir.). Given

the absence of even such minimal allegations about Hernández's own connections to the United States, there is no basis for petitioners' assumption (Cert. Reply Br. 2) that their Fourth Amendment claim would have survived if it had been brought in Arizona rather than Texas.[4]

B. The Court Of Appeals Correctly Concluded That Agent Mesa Is Entitled To Qualified Immunity On Petitioners' Substantive-Due-Process Claim

Petitioners also contend (Pet. 23-31) that the court of appeals erred in unanimously concluding that Agent Mesa is entitled to qualified immunity on their substantive-due-process claim. In their view, all 15 members of the en banc court erroneously relied on Hernández's status as a non-U.S. citizen, when Mesa did not actually know that fact at the time of the shooting. Petitioner's argument about "an officer's after-the-fact discovery of a person's legal status" (Pet. 23) was passed upon, at most, only implicitly, without any explanation as to the court of appeals' reasons for disagreeing with petitioners. In any event, no Fifth Amendment violation was clearly established, and there is no conflict between the decision below and that of any other court of appeals.

1. Petitioners do not explain why Hernández suffered a Fifth Amendment violation, much less show that any such violation was so clearly established that qualified immunity is unavailable. They suggest (Pet.

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[4] In support of their Fourth Amendment argument, petitioners quote Judge Prado's observation that this Court might "clarify the reach of *Boumediene*." Cert. Reply Br. 2-3 (quoting Pet. App. 43). But Judge Prado made that statement in the context of petitioners' *Fifth* Amendment claim and agreed that their Fourth Amendment claim is meritless. Pet. App. 36.

29) that "a reasonable officer" would not "have believed that deadly force was necessary in the situation that [Agent Mesa] faced," but, in doing so, they cite a discussion of the Fourth Amendment in *Graham* v. *Connor*, 490 U.S. 386, 397 (1990), rather than any Fifth Amendment cases. They also suggest that, because this case involves an allegedly "unjustified extrajudicial killing," "the wrongfulness of the conduct is obvious." Pet. 30 (quotation marks omitted). Qualified immunity, however, is not about the reasonableness or wrongfulness of an officer's conduct in the abstract. An action may be unreasonable, wrong, or illegal without being unconstitutional—and, as specifically relevant here, without violating substantive due process. "To be clearly established" for qualified-immunity purposes, "a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates *that right*." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added; citations, internal quotation marks, and modifications omitted).

Here, the state of Fifth Amendment law was doubly unclear. The court of appeals' members disagreed about (1) whether, in light of *Graham*, *supra*, such an excessive-force claim could be amenable to substantive-due-process analysis at all,[5] and (2) whether any

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[5] Compare Pet. App. 10-11 (Jones, J., concurring) (finding that any claim must arise under the Fourth Amendment, not the Fifth), with *id.* at 36 (Prado, J., concurring) (finding that, because "the Fourth Amendment does not 'cover' this claim of excessive force," petitioners "may invoke the Fifth Amendment's prohibition on constitutionally arbitrary official conduct").

Fifth Amendment protections would extend to someone, like Hernández, in Mexico.[6]

The answer to the first of those two questions—about the *nature* of the excessive-force claim, rather than the status of the victim—is unaffected by after-acquired facts and is therefore entirely independent of the question petitioners ask this Court to resolve. See Pet i, 23-31; Cert. Reply Br. 3-4. Moreover, uncertainty about the *Graham* question alone would keep the alleged Fifth Amendment violation from being clearly established. See *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy."); see *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011). In other words, the outcome of petitioners' qualified-immunity question does not even turn on the concerns about using hindsight on which petitioners rest their petition.

2. With respect to the second uncertainty identified by the dueling Fifth Amendment discussions in the opinions below, even if petitioners' claim properly sounds in substantive-due-process, it is far from clearly established that Hernández actually possessed Fifth Amendment rights. Petitioners contend (Pet. 23-25) that the decision below conflicts with *Moreno* v. *Baca*, 431 F.3d 633 (9th Cir. 2005), cert. denied, 547 U.S. 1207 (2006). In *Moreno*, the Ninth Circuit denied qualified immunity to two police officers who arrested and searched a U.S. citizen within the United States in violation of clearly established Fourth Amendment law. In reaching that conclusion, the court rejected

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[6] Compare Pet. App. 16-20 (Jones, J., concurring), with *id.* at 36-42 (Prado, J., concurring).

the officers' reliance on the fact that the plaintiff was on parole and that there was a warrant for his arrest, reasoning that the officers had no reason at the time to know or reasonably suspect that those facts were true. *Id.* at 638-639. It explained that "the facts upon which the reasonableness of a search or seizure depends * * * must be known to the officer at the time the search or seizure is conducted." *Id.* at 642.

The nature of the legal question in *Moreno*, however, differs from the one implicated by the decision below. *Moreno* turned on "reasonableness," 431 F.3d at 642, and presented no uncertainty about the threshold question of whether the defendant, who was in the United States when he was searched, was protected by the Fourth Amendment. Similarly, the Seventh and Eleventh Circuit decisions that petitioners cite (Pet. 27) involved queries about what constitutes "excessive" force in situations arising in the United States where the Fourth Amendment indisputably applied as a threshold matter.[7] Here, by contrast, the relevant legal question is, as discussed above, not whether Agent Mesa acted unreasonably, but the antecedent question whether Hernández had any constitutional right at all. Petitioners identify no case addressing the application of qualified-immunity analysis to such threshold questions.

Moreover, even if Agent Mesa's subjective knowledge were relevant when answering the threshold question of whether the Fifth Amendment's applicability to Hernández was clearly established, petitioners do not suggest that Mesa had any reason to know that

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[7] See *Rodriguez* v. *Farrell*, 280 F.3d 1341, 1353 (11th Cir. 2002), cert. denied, 538 U.S. 906 (2003); *McDonald by McDonald* v. *Haskins*, 966 F.2d 292, 293 (7th Cir 1992).

Hernández was a U.S. citizen or someone with substantial connections to the United States (which, in fact, he was not). And they identify no cases addressing whether an individual of *unknown* nationality has clearly established Fifth Amendment rights while outside the United States.[8] Indeed, the most analogous case that petitioners identify (the district court decision in *Rodriguez*) *dismissed* the plaintiff's Fifth Amendment excessive-force claim on the ground that such claims are "more properly analyzed under the Fourth Amendment." 111 F. Supp. 3d at 1038.

Accordingly, the second question presented does not warrant this Court's review.

C. The Dismissal Of Petitioners' *Bivens* Claims Is Independently Supported By Alternative Grounds

Even if the questions presented otherwise warranted this Court's review, this case would be a poor vehicle for their resolution because the dismissal of petitioners' *Bivens* claims is independently supported by two alternative grounds that the government advanced below: Special factors counsel against recognizing a *Bivens* remedy in the sensitive context of an international cross-border shooting incident; and the FTCA's judgment bar precludes petitioners' *Bivens* action.

1. Whatever the merits of the constitutional arguments, petitioners' suit should be dismissed as a

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[8] Cf. *Boumediene*, 553 U.S. at 760-761 (noting that, under *In re Ross*, 140 U.S. 453 (1891), U.S. citizens abroad lack constitutional rights in some circumstances); *Reid* v. *Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result) ("I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world."); *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (quoting same).

threshold matter, because the judicially inferred *Bivens* remedy should not be extended to the sensitive, cross-border context of this case.

"Because implied causes of action are disfavored," the Court has repeatedly explained that it "has been reluctant to extend *Bivens* liability to any new context or new category of defendants." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (internal quotation marks omitted). It "ha[s] consistently refused to extend *Bivens* liability" since 1980. *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Minecci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases). Thus, even when there is no indication from Congress that the Court should "stay its *Bivens* hand," it must "'pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

Although the en banc court of appeals did not address this question, Pet. App. 7 n.1, the original panel majority concluded that no special factors counsel hesitation before extending the *Bivens* remedy to the concededly new context of this case because it ultimately involves "domestic law enforcement and nothing more," *id.* at 98. But that is simply not true. The Department of Homeland Security and its components, including U.S. Customs and Border Protection, have been charged by Congress with a primary mission of preventing terrorist attacks within the United States and securing the border. See 6 U.S.C. 111, 202. Hernández was in Mexico when he was shot. Petitioners' suit thus implicates national security and international

diplomacy (as shown by the amicus briefs that Mexico has filed in this Court and the court of appeals).

As a general matter, the Court has recognized a presumption against the extraterritorial application of judge-made causes of action, even where Congress has authorized a common-law-making power. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013). The specific context of this case reinforces that general presumption. In *Verdugo-Urquidez*, the Court contemplated that special factors could prevent the recognition of a *Bivens* remedy for "claimed violations of the Fourth Amendment in foreign countries." 494 U.S. at 274. Moreover, in the FTCA, Congress has already provided an extensive regime for compensating the victims of torts committed by government officers, but it has declined to extend that regime to claims arising in a foreign country, despite this Court's recognition that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). The same concerns that warranted that limitation on the statutory remedy support a similar limitation on any *Bivens* remedy in the context of a cross-border shooting.

2. Any *Bivens* claim by petitioners could be separately precluded by the FTCA's judgment bar, which provides that "[t]he judgment in an" FTCA action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Petitioners' *Bivens* claims were added to this case after the district court had already entered the final

judgment dismissing their FTCA claim on the basis of the FTCA's exception for "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k). See Pet. App. 127-140. In the court of appeals, the government contended that the district court's FTCA judgment triggers Section 2676's judgment bar and therefore precludes petitioners' *Bivens* actions against Agent Mesa and his alleged supervisors, which indisputably arise from the same subject matter as petitioners' previously dismissed FTCA claim. See 12-50217 and 12-50301 C.A. Br. for Appellees Cordero and Manjarrez 43-46; En Banc C.A. Supp. Br. for U.S. and Appellees Cordero and Manjarez 55-63.

In *Simmons* v. *Himmelreich*, No. 15-109 (to be argued Mar. 22, 2016), the Court is already considering whether Section 2676's judgment bar applies when (as here), the prior FTCA judgment was a dismissal based on one of the exceptions to FTCA liability contained in Section 2680. The government contends that the judgment bar applies in those circumstances. See Pet. Br. at 16-52, *Simmons*, *supra*. If the Court agrees with the government's position in *Simmons*, that would provide an independent basis for dismissing the *Bivens* claim against Agent Mesa and would obviate any need to address the merits of petitioners' Fourth Amendment and qualified-immunity arguments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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